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SUPREME COURT, U.S.

IN THE SUPREME COURT

OF THE UNITED STATES

JOSEPH HOPPER, WARDEN,

PETITIONER

v.

NO. 77-477

TYRONE BARNETT,

RESPONDENT

RESPONSE TO PETITION

FOR A WRIT OF CERTIORARI

TO THE FIFTH CIRCUIT COURT OF APPEALS

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IN THE SUPREME COURT

OF THE UNITED STATES

JOSEPH HOPPER, WARDEN,

PETITIONER

VS. NO. 77-477

TYRONE BARNETT,

RESPONDENT

RESPONSE TO PETITION

FOR A WRIT OF CERTIORARI

A. Counter-Statement of the Question Presented

Whether, once a state judge has determined that an appropriate punishment for a particular offender in a particular case does not require his incarceration, the State has the power, despite the Equal Protection Clause of the 14th Amendment, to exclude him from probation and to confine him for his involuntary inability to pre-pay in lump sum a fine imposed as a condition precedent to probation.

B. Further Statement of the Case

Relying upon their families' assurances that they would supply the necessary funds, the Respondent and his co-defendant entered negotiated guilty pleas to charges of armed robbery in the Liberty (Georgia) Superior Court). The Court sentenced each to ten years but provided that the sentences could be served on probation upon the pre-payment of $2,000 fines. (Appendix 1 is a copy of the Respondent's sentence.)

The co-defendant's family came through for him and paid his fine. He was released shortly after sentencing. For reasons never disclosed, however, the Respondent's family reneged on the promise that they had made to the Respondent and his attorney. When it became apparent that they would not forward the money, the Respondent timely moved the trial court to modify his sentence to permit him to pay his fine off in instalments as a condition of probation. His motion was never entertained on the merits. See Barnett v. State, 231 Ga. 741, 204 S.E.2d 296 (1974).

He then unsuccessfully sought a state writ of habeas corpus before a different judge, challenging his confinement as a violation of his right to the equal protection of the laws, Barnett v. Hopper, 234 Ga. 694, 217 S.E.2d 280 (1975). (App. ii-iii is a copy of the order in the lower state court.) Thereafter he sought the federal writ, 28 U.S.C. 2254. The District Court denied relief, not on the merits, but upon the basis (never urged by the State) that he had waived any equal protection claim "by entering into the negotiated plea bargain" (App. iv).-1)

The Fifth Circuit Court of Appeals reversed, finding (a) no waiver of the equal protection claim and (b) a violation of equal protection "to imprison an indigent when in the same circumstances an individual of financial means would remain free," Barnett v. Hopper, 548 F.2d 550 at 554 (5th Cir. 1977).

The State then applied to this Court for a writ of certiorari to review (b), the merits. While its application was pending, the

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-1) In none of these proceedings was there any finding that the Respondent had ever intentionally misrepresented his circumstances to the trial judge. The record of the state habeas hearing demonstates clearly that both he and his counsel relied in good faith upon the assurances of his family.

Supreme Court of Georgia rendered an opinion in Hunter v. Dean, ___ Ga. ___, ___ S.E.2d ___ (No. 32401, 28 Nov. 1977) (copy attached as App. v-xiv), rejecting the Fifth Circuit's reasoning in Barnett, adhering to its previous positions on the point, and, for the first time, outlining its reasoning.-2)

C. Why This Court Should Not Disturb the Judgment Below

Whatever the constitutional propriety of financial distinctions may be in a civil context, see Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), Dandridge v. Williams, 397 U.S. 471 (1970), San Antonio School District v. Rodriguez, 411 U.S. 1 (1973), Maher v. Roe, ___ U.S. ___ (1977), this Court has made it clear that fundamentally different considerations abound in the context of the criminal law, Griffin v. Illinois, 351 U.S. 12 (1956), Burns v. Ohio, 362 U.S. 252 (1959), Lane v. Brown, 372 U.S. 477 (1963). See Maher v. Roe, supra at ___, n. 6. There this Court has characterized it as "the central aim of our entire judicial system [that] all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' * * * In criminal trials a state can no more discriminate on account of poverty than on account of religion, race, or color," Griffin v. Illinois, supra at 19 (citation omitted). "There can be no equal justice," this Court concluded, "where the kind of trial a man gets depends on the amount of money he has," id. at 19.

-2) A petition for a writ of certiorari will shortly be filed in Hunter v. Dean. See Rule 19 of this Court.

Also, this Court should not be unaware that the Respondent has been paroled from his sentence. Unresolved issues of possible mootness thus lurk in this case, cf. North Carolina v. Rice, 404 U.S. 244 (1971). They are not present, however, in Hunter because a District Court released her on recognizance pendente lite so that she could afford the State Supreme Court to reconsider in view of the mounting authority in the local District Courts.

Griffin and the cases which followed it generally dealt with financial barriers to effective access to procedures which the States had established for criminal trials and reviews, e.g., Smith v. Bennett, 365 U.S. 708 (1961), Douglas v. California, 372 U.S. 353 (1963), Rinaldi v. Yeager, 384 U.S. 305 (1966). See Ross v. Moffitt, 417 U.S. 600 at 606 (1974). This case and its companion, Hunter v. Dean, supra (App. v), present the closely related question of whether the States, having provided a system of probation as ameliorative punishment for selected criminals, can bar one solemnly adjudged qualified from effective access to its benefits solely because he is an indigent and unable to pre-pay an assessed fine. To focus the issue under Griffin, it is essentially a question of whether equal justice exists "where the kind of [punishment] a man gets depends on the amount of money he has." It is a question which, in different circumstances, this Court has answered before, though apparently not clearly enough. See Williams v. Illinois, 397 U.S. 235 (1970), Morris v. Schoonfield, 399 U.S. 508 (1970), Tate v. Short, 401 U.S. 395 (1971).

Setting appropriate, individualized punishments is an integral part of the criminal justice system. Trial judges have been vested with a wide sentencing discretion allowing them to take account of an infinite variety of circumstances, Williams v. New York, 337 U.S. 241 (1949). But neither the width of the discretion nor the complexities of exercising it is any reason why the ancient pledge of the Magna Carta, "To *no* man will we sell . . . right or justice," and the modern promise of equal justice of the 14th Amendment should not extend to issues of punishment in a given case, as is part of the position of the State of Georgia. See Petition, p. 12, Hunter v. Dean at App. x. Neither is a good excuse not to scrutinize the application of sentencing discretion to create invidious classes of prospective probationers based on impermissible considerations, cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886). There are, after all, limits to that discretion, see Townsend v. Burke, 334 U.S. 736 (1948), North Carolina v. Pearce, 395 U.S. 711 (1969), Proffitt v. Florida, ___ U.S. ___ (1976). And certainly among them is the

Equal Protection Clause of the 14th Amendment, Tate v. Short, supra.

Nonetheless, it is the adamant position of the State of Georgia that the ability to pre-pay a fine is a legitimate consideration for probation eligibility and that it may therefore explicitly approve one type of punishment for the rich and a harsher type for the equally culpable and otherwise equally situated poor. Such a wealth discrimination is permissible, in her view, essentially because it arguably serves a legitimate interest in the context of predicting success on probation. -3) See Petition, p. 14, Hunter v. Dean at App. ix-x.

But the State's argument proves too much. Just as an indigent probationer might be tempted by his poverty to commit other crimes (despite presumably being "under close supervision until it is deemed that he can become a constructive member of society," Hunter v. Dean at App. ix, Petition, p. 11), probation may not at all deter his wealthy counterpart who has only had his knuckles, protectively thrust into his deep pockets, lightly (for him) rapped. Just as a family's payment of a fine might arguably reflect added control over the probationer through its interest and confidence in him, Hunter v. Dean, App. at xi, it might as easily suggest that someone lucky enough to be born into a wealthy (or indulgent) family will not be stung at all by the sentence. And in contrast to an indigent probationer, who may not commence probation with a paid-in "stake" in succeeding, Hunter v. Dean at App. xii, Petition, p. 13, but who would have a definite interest in working responsibly in order to

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-3) Probably much the same argument might be made of other human characteristics. To some minds, political persuasion, religion, race, or national origin might be important indicators, but they are no less forbidden considerations. See, e.g., Griffin v. Illinois, supra at 15.

maintain his payments, his wealthier counterpart, flushed with the power of his money or the influence of his family, may not be motivated to do anything, including changing his errant habits.

In short, ecomonic status is at best an ambiguous consideration. From the same faulty premise that wealth is relevant to sentencing can arise an equally cogent (and equally fallacious) argument that it is the wealthy defendant who ought to be incarcerated and the poor one permitted to pay a fine. -4)

In any event, more than just a "legitimate" State interest in the discrimination is necessary in order to sustain it. Since in the context of the criminal law wealth is clearly a "suspect" classification, Griffin v. Illinois, supra, Georgia "must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necesgary to the accomplishment' of its purpose or the safeguarding of its interest," In re Griffiths, 413 U.S. 717 at 722 (1973) (citation omitted).

Moreover, the classification in effect created in the Respondent's case affects a recognized "fundamental right," his conditional liberty as a probation, Morrisey v. Brewer, 408 U.S. 471 (1972). Approaching the matter from that direction, Georgia is obliged to

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-4) The State has suggested that the Respondent's position "would result in inverse discrimination as to defendants under an identical sentence who were financially able to pay the fine immediately," Hunter v. Dean at App. viii. Considering that the Respondent does not wish to avoid the fine but merely to have a fair opportunity to pay it in a reasonable alternative fashion (such as this Court has already implicitly approved, Tate v. Short, supra at 400, n. 5), any difference between a lump sum payment and a series of instalments is a de minimis discrimination at best. The Respondent seeks only the same option open to his wealthy counterpart: to pay a fine and escape imprisonment. See In re Antazo, 473 P.2d 999 (Calif. 1971).

demonstrate that its interest in disqualifying indigent defendants from probation is a compelling one, Shapiro v. Thompson, 394 U.S. 618 (1969), Williams v. Rhodes, 393 U.S. 23 (1968).

Georgia simply has not done either. She has yet to show why the Respondent (or Ms. Hunter) should suffer imprisonment "solely because [he] is indigent and cannot pay the fine in full," Morris v. Schoonfield, supra at 509, Tate v. Short, supra at 398, and why he should not be allowed to pay the fine off during the probation that he was adjudged worthy of.

D. Conclusion

To imprison an indigent when in the same circumstances a person of means would remain free constitutes a denial of the equal protection of the law. Whether the confinement results from a fine being directly converted into imprisonment or from a fine imposed as a condition precedent to probation, the fundamental result is the same: the defendant involuntarily unable to pay is "subjected to imprisonment solely because of his indigency."

The trial court has determined that the Respondent need not be confined for his crime and that the State's penal interests would be met by a fine and probation. This is an individualized sentence and the Respondent certainly has no quarrel with the court's essential judgment. But he does take issue with the mode of payment which has been required and which has effectively, irrationally, unnecessarily, and impermissibly barred him from the benefits which the court adjudged him worthy of.

The State must accomodate his indigency and permit him the same escape from confinement open to a defendant of means under the same sentence: to pay a fine and serve his sentence on probation. It cannot offer probation only to those who can pay for it.

Whether a person can pay a fine immediately has no apparent relationship to punishment or to rehabilitation. It serves no State interest not served equally well or better by permitting instalment payments.

The judgment of the Court of Appeals was correct and should not be disturbed.

James C. Bonner, Jr.
Counsel for the Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 1978, I mailed first-class a copy of the foregoing response to the counsel for the Petitioner, Assistant Attorney General Dean Grindle, 132 State Judicial Building, 40 Capitol Square, SW., Atlanta, Georgia 30334.

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(404/542-4241)

SENTENCE 12 Jan.

Charge Armed Robbery

Liberty Superior Court

Feb. Term, 1923

No. 1576

THE STATE : (PLEA) (~~VERDICT~~) OF GUILTY

vs. :

Dyrone J Barnett :

:

WHEREUPON, It is ordered and adjudged by the Court that the Defendant, Dyrone J Barnett be taken from the Bar of this Court to the Jail of Liberty County, and be there safely kept until a sufficient guard is sent for him from the Georgia Penitentiary, and be then delivered to, and be by such guard taken to said Penitentiary, or to such other place as the Directory of Corrections may direct, where he, the said defendant, be confined at labor for the full term of 10 years years, to be computed according to law. 10 yrs Probated upon Payment of Fine & Costs as indicated Cost

Defendant has been advised concerning the consequence of an escape during the service of this sentence. Jail time has been taken into consideration by the Court in this sentence. The defendant was represented in this case by Libby & Mayfield Attorney.

In Open Court, this 4 day of May, 1923

Judge, Superior Court, Atlantic Judicial Circuit of Georgia

District Attorney, Atlantic Judicial Circuit of Georgia

GEORGIA Liberty COUNTY.

I, the undersigned (Deputy) (Clerk) of the Superior Court, in and for said County, do hereby certify that the above is a true and complete copy of the sentence and judgement of the Court in the Case of State vs. Dyrone J Barnett convicted of Armed Robbery as appears of record and from the minutes of said Court.

Given under my official signature and the seal of said Court, this 21 day of May, 1923

Journal Print—Reidsville, Ga.

(Clerk) (Deputy Clerk)

N.P. 1

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

TYRONE F. BARNETT, Petitioner	)	
-vs-	)	HABEAS CORPUS
JOESEPH S. HOPPER, Warden Georgia State Prison, Respondent	)	CIVIL ACTION NO. 74-72

ORDER

The above styled case was heard on May 2, 1974 in the Tattnall County Courthouse by order of this Court. After consideration of the Petition, hearing credible testimony and observing documentary evidence, this Court finds as follows:

FINDINGS OF FACT

The Petitioner, Tyrone F. Barnett, is confined in the Georgia State Prison, Reidsville, Georgia by virtue of a sentence of ten years probated upon payment of fine of two thousand ($2,000.00) dollars. The above sentence was imposed as a result of Petitioner's plea of guilty to armed robbery on May 4, 1973 in the Liberty County Superior Court.

The Petitioner filed his petition in forma pauperis and was represented at his Habeas Corpus evidentiary hearing by Attorney James C. Bonner, Jr., of the Prisoner Legal Counseling Project, University of Georgia School of Law. The Petitioner alleges that his sentence of "ten years probated upon payment of fine of two thousand ($2,000.00) dollars" deprives him of his constitutional rights because he is an indigent and was forced to serve time in prison because he cannot pay the fine. Petitioner states that this is a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Filed in Office
This 2nd day of July 1975
Lucie W. Rowland
Clerk
Deputy

App. ii

The above allegation was argued on behalf of Petitioner and others (related cases) before the Liberty County Superior Court on a motion for sentence modification on September 7, 1973. The Liberty Superior Court denied the motion and that decision was affirmed on appeal to the Georgia Court of Appeals on March 14, 1974. State vs. Judy D. Neal, Case No. 48858.

This Habeas Corpus Court finds that it is well settled that "in any case where the judge may...place on probation any person convicted of a felony, such judge may in his discretion fine such person so convicted not more than $2,000.00 as a condition to such probation." See Ga. Code Ann., Section 27-2529.

This Habeas Corpus Court further finds that Petitioner's sentence complied with the provisions of Section 27-2529, and was therefore a valid probationary sentence. Also, the Georgia Court of Appeals has upheld the validity of the above Section 27-2529. See Payne vs. The State, 117 Ga. App. 92, 93.

FINDINGS OF LAW

I therefore find that none of Petitioner's constitutional rights have been violated and that he is serving a legal sentence.

It is therefore CONSIDERED, ORDERED, and ADJUDGED that the Petitioner be remanded to the custody of the Honorable Joe S. Hopper, Warden, Georgia State Prison, Reidsville, Georgia.

The costs of this proceeding are taxed against the Respondent.

This 18th day of February, 1975.

DAN S. COWART, JUDGE
State Court of Tattnall County, Georgia
PRO HAC VICE Judge of Superior Court
Tattnall County, Georgia

I, Susie W. Rowland Deputy, Clerk of the Superior Court in and for said County, do hereby certify that the within and foregoing contains a true and correct copy of the Final Order of Judge J. Brown T. Brown (ret) Ga. J. Hopper, Warden, Case #E-24-75 as appears from the records in this office.

Given under my hand and seal this the 20th day of February 1975.

Susie W. Rowland - Deputy

Southern District of Ga.
Filed in office
3:50 P. M.
July 9 1976
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

TYRONE F. BARNETT	*	CIVIL ACTION
VS.	*	NO. 475-236
JOSEPH S. HOPPER, Warden	*	

O R D E R

This 2254 petition brought in forma pauperis shows that Barnett, as part of a negotiated plea bargain knowingly and voluntarily accepted by him, was sentenced to ten years imprisonment, to be probated on his payment of a $2,000 fine. He now contends that since he is an indigent, such a condition violates his constitutional right to equal protection of the law. The answer to his complaint is quite simple. There is an ancient maxim: "Volenti non fit injuria." The conclusion in inescapable that Barnett waived any constitutional right, not simply by pleading guilty, but by entering into the negotiated plea bargain. In substance, his complaint is not that the plea bargain was breached, but that it was honored.

Accordingly, the complaint is ordered dismissed.

So Ordered, this 9th day of July, 1976.

United States District Judge

APP IV

528

In the Supreme Court of Georgia.

Decided: NOV 28 1977

32401. HUNTER v. DEAN, Sheriff, et al.

MARSHALL, Justice.

This appeal is from the denial of a petition for writ of habeas corpus by the Superior Court of Terrell County. The appeal was granted to consider whether the probation of a jail sentence may constitutionally be conditioned upon the payment of a fine in a lump sum when the defendant is indigent and unable to make immediate payment of the fine. We affirm the trial court.

Petitioner, Jacquelyn Hunter, and a co-defendant both pled guilty to burglary and were sentenced to two years in the penitentiary. The sentence was to be probated upon payment of a fine of $165. The co-defendant paid the fine and his sentence was probated. Petitioner was unable to pay the entire amount in a lump sum. She was incarcerated.

Petitioner argues that a trilogy of Supreme Court cases -- Tate v. Short, 401 U. S. 395 (91 SC 668, 28 LE2d 130) (1971); Morris v. Schoonfield, 399 U. S. 508 (90 SC 2232, 26 LE2d 773)

App. V

(1970); and Williams v. Illinois, 399 U. S. 235 (90 SC 2018, 26 LE2d 586) (1970) -- mandates the conclusion that it is unconstitutional to subject a defendant to imprisonment solely because the defendant is financially unable to pay a fine immediately in a lump sum. The petitioner points out that this view was adopted by the United States Court of Appeals for the Fifth Circuit in Barnett v. Hopper, 548 F2d 550 (5th Cir. 1977), in granting habeas relief previously denied by this court in Barnett v. Hopper, 234 Ga. 694 (217 SE2d 280) (1975). Consequently, we are asked to reexamine our holdings in Calhoun v. Couch, 232 Ga. 467 (207 SE2d 455) (1974), and Barnett v. Hopper, supra.

In Calhoun v. Couch, 232 Ga. 467, supra, and Barnett v. Hopper, 234 Ga. 694, supra, this court rejected arguments by defendants that their conditionally probated sentences made their imprisonment (resulting from an inability to pay the fine) a denial of equal protection under the Fourteenth Amendment of the United States Constitution. The court found several United States Supreme Court cases -- Williams v. Illinois, supra; Morris v. Schoonfield, supra; and Tate v. Short, supra -- distinguishable from a conditionally probated sentence imposed pursuant to Code Ann. § 27-2709 (Ga. L. 1956, pp. 27, 31; as amended).

App. vi

Relevant to the petitioner's citing of Barnett v. Hopper, 548 F2d 550, supra, it is obvious that Barnett v. Hopper misinterprets the U. S. Supreme Court's opinions and should not be applied here. This case is controlled by Williams v. Illinois, 399 U. S. 235, 243 (SC ; LE2d) (1970) where it is stated, "It bears emphasis that our holding does not deal with a judgment of confinement for nonpayment of a fine in the familiar pattern of alternative sentence of '$30 or 30 days.' We hold only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly. We have no occasion to reach the question whether a State is precluded in any other circumstances from holding an indigent accountable for a fine by use of a penal sanction. We hold only that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.

App. vii

"The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction."

We are not willing to hold under the facts of this case that a condition of sentence to be served on probation may not include the immediate payment of a fine. Such a sentence does not violate the due process and equal protection clause of the Fourteenth Amendment to the U. S. Constitution. On the contrary, to hold as urged by petitioner would result in inverse discrimination as to defendants under an identical sentence who were financially able to pay the fine immediately. In effect, the trial judge would be saying, "Since you are able to pay the fine, you must pay it all now; this is true, although those who can't pay it now may pay it later." Williams v. Illinois, supra.

There follow several reasons justifying the imposition of a lump-sum fine, without regard to the ability of the defendant to pay it immediately.

First, conclusions reached in Barnett v. Hopper, 548 F2d 550, supra, fail to take into account the fact that the ability

of a defendant to pay a fine is often a factor for the sentencing judge to consider in assessing the likelihood that the defendant will serve a term of probation without violation. Stated in another fashion, a conditionally probated sentence is not necessarily invidious discrimination based on wealth if the sentencing judge has determined that the defendant would not be a good candidate for probation unless a fine is paid first.

Second, the Supreme Court in the Williams-Morris-Tate trilogy emphasized the absence of the furtherance of any valid penal objective by the state statute in question that converted a fine into a term of imprisonment for failure to pay the fine. Tate v. Short, supra, 401 U. S. at 399; Williams v. Illinois, supra, 399 U. S. at 242. Probation, in contrast to a fine that only raises revenue, does indeed further the penal objectives of a state. The probationer is maintained under supervision which it is hoped is close until it is deemed that he can become a constructive member of society without such supervision.

Third, probation is an integral tool in the rehabilitation of the convicted felon. Many factors are present in determining whether the convicted felon should be released on probatic or parole. See Scarpa v. United States Board of Parole, 477 F2d

278, 281 (5th Cir. 1973). The decision to place the convicted felon on probation is therefore not one to be entered into lightly, especially if the defendant has been convicted of a serious crime such as burglary. The trial judge is vested with a wide discretion in sentencing matters in order that an appropriate punishment can be molded to fit "the countless variety of situations that appear." Williams v. Illinois, supra, 399 U. S. at p. 243.

Fourth, viewed from the perspective of the court below at the time of sentencing in this case, the sentence which resulted was quite reasonable, as well as appropriate to the circumstances of the particular case and the individual involved. Of critical significance is that the sentence imposed and the sentence challenged here was based on a representation that a fine could be paid by the person seeking probation.1/ It would be impossible now to reconstruct each of the considerations which entered into the judge's decision to place Ms. Hunter on probation on the condition that she pay a fine, but the fact that she assured the sentencing court that she could pay the fine had to be one of them.

1/ According to the appellant's brief, the following colloquy occurred just prior to sentencing: "Judge: Jacquelyn, are you able to pay a fine? Jacquelyn Evon Hunter: Yes. Judge: How can you pay a fine? Jacquelyn Evon Hunter: My . . . my cousin, Richardson . . . going to pay it." It further appears that Richardson was a school teacher and presumably able to pay the relatively small fine.

App. 2

Fifth, before a sentencing judge makes a decision to probate a sentence, he must determine whether the particular defendant is a good probation risk. Specifically, the judge must decide that the individual defendant is not likely to engage in a continuing course of criminal conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law. It was the judge's determination in this case, on the basis of the representation made to him, that Ms. Hunter would be a good probation risk should she first pay the fine that was imposed. The fine aspect of the judgment simply does not place the appellant in a position where she is suffering disparate treatment based solely on wealth. On the issue of probation, the fine and ability to pay the fine provided assurances to the trial judge that the probation would be successful. A trial judge, upon receiving a representation that a family member is willing and able to pay the fine, knows that added control over the sentence is provided by the interest of the family and the belief of the family member that the defendant could successfully serve a perio of probation.

App. 21

Sixth, the payment of a fine places upon a given probationer a greater responsibility in successfully serving the period of probation than not paying a fine or paying a fine over the entire period of the sentence; if a breach of probation occurs, the fine money is lost and the only credit the defendant receives is that for the time spent on probation. Code Ann. § 27-2529 (Ga. L. 1957, p. 477; 1964, p. 496). Succinctly, the fine feature of the probationary sentence does not result in disparate treatment on the basis of wealth, but on acceptable considerations stemming from the fact that an accused has assured the sentencing court that a fine can and will be paid.

Seventh, a commitment by a trial court to impose a probated sentence in a serious crime must always be a close and difficult question; if a defendant's willingness to pay a fine is a factor which provides the court added assurance that the individual is a good risk for probation, the subsequent or later developed fact that the individual cannot pay the fine materially alters the original considerations which went into the judgment. In such a case, the judgment has already been made for the defendant -- if the fine cannot be paid, the defendant is not a good risk for probation and the sentence must be served.

App. xii

Eighth, if ability to pay can never be considered by the trial judge as a condition of probation when the defendant is relatively poor, in many cases the judge will no doubt be inclined to sentence the defendant to a term of imprisonment rather than a conditionally probated sentence. This result, urged by the appellant, does not bode well for the state and defendants, as a class, alike. Following the petitioner's contention may have an adverse effect on indigent defendants. It could encourage trial judges to impose straight jail sentences in order to ensure that the defendant receives some punishment and to avoid putting the court in the collection business with little likelihood of recovering time-payment fines from an indigent. That wealth may enable a defendant more easily to serve a term of probation successfully, is no doubt an advantage to the wealthy, but, with all other factors equal, if in a particular case the poor defendant is not a good candidate for probation because of a lack of funds, his imprisonment is simply not the result of invidious discrimination; his imprisonment is the result of his being a poor risk for probation.

Finally, it is clear from the appellant's brief, that the petitioner never claimed to be indigent, and unequivocally

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informed the court that she was able to pay a fine. It was on this basis that the court framed its sentence. Had the court been informed of the petitioner's claimed indigency and inability to pay a fine at the time of sentencing, the sentence might have been entirely different, i.e., a short sentence of incarceration, a longer sentence of probation, or the payment of the fine in periodic installments.

We do not think that a defendant should be able to mislead the court as to ability to pay a fine, thus inducing an alternate sentence, and later seek to rely upon constitutional safeguards to avoid punishment.

Judgment affirmed. All the Justices concur.

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